TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 30

CITY BANK FARMERS TRUST COMPANY, EXECUTOR UNDER THE WILL OF THOMAS B. CLARKE, DECEASED, APPELLANT,

vs.

WILLIAM A. SCHNADER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, AND LEON D. METZGER, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED MAY 4, 1934

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPTEMBER TERM, 1932

No. 7395

CITY BANK FARMERS TRUST COMPANY, Executor Under the Will of Thomas B. Clarke, Deceased,

vs.

Honorable WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

L. M. Swope, Drinker, Biddle & Reath, H. S. Drinker, Jr., H. Gordon McCouch.
W. A. Schnader.

DOCKET ENTRIES

Nov.	23, 1932.	Bill of Complaint filed.
"	23, "	Subpœna and Duplicate-Original Subpœna exit—returnable December 13, 1932.
"	23, "	Appearance of L. M. Swope, Esq., H. S. Drinker Jr. Esq., and H. Gordon McCouch, Esq., for plaintiff filed.
"	23, "	Motion for interlocutory injunction filed.
"	23, "	Injunction affidavit by C. C. Jordon filed.
"	23, "	Injunction affidavit by F. Kimball filed.
"	25, "	Restraining order filed.
"	25, "	Bond sur restraining order in $1,000 with American Surety Company of New York surety, and Decree approving same filed.
"	25, "	Printed copy of bill of complaint filed.
"	30, "	Proof of service of notice required by Sec. 266 of the Judicial Code filed.
Dec.	2, 1932.	Duplicate original su-pœna returned; "on November 29, served" and filed.
"	6, "	Subpœna returned: "on November 23, served Wm. A. Schnader; not requested to serve L. D. Metzger", and filed.

[fol. 2]

Dec. 19, 1932. Answer filed.
" 19, " Argued sur motion for interlocutory injunction.
Jan. 5, 1933. Printed copy of stipulation filed.
Mar. 24, 1933. Opinion (Thompson, C. J., Dickinson and Kirkpatrick, D. JJ.) that Bill of Complaint be dismissed for want of equity filed.
Apr. 11, 1933. Final Decree dismissing Bill of Complaint filed.
" 11, " Assignments of Error and prayer for reversal filed.
" 11, " Petition for appeal and Decree allowing appeal filed.
" 11, " Statement as to jurisdiction of appeal filed.
" 11, " Bond for costs sur appeal in $250 with American Surety Company of New York surety, and Decree approving same filed.
" 11, " Citation to Supreme Court of United States exit.
" 28, " Citation returned: "service accepted" and filed.
May 4, 1933. Proof of service of copy of appeal papers filed.
" 8, " Præcipe for transcript of record sur appeal filed.
" 8, " Proof of service of præcipe for transcript of record sur appeal filed.
May 17, 1933. Transcript of record transmitted to counsel for plaintiff-appellant.
Jan. 16, 1934. Mandate from Supreme Court of United States reversing decree of this Court and remanding cause to this Court with instructions to reinstate Bill of Complaint and proceed to a hearing upon the merits, filed.
Feb. 5, 1934. Argued sur Pleadings and Proofs.
Mar. 29, 1934. Opinion, Kirkpatrick J., of Special Court (Thompson, C. J., Dickinson and Kirkpatrick, D. JJ.) granting leave to dis-

miss Bill of Complaint, together with findings of fact and conclusions of law, and dissenting opinion, filed.

Apr. 5, 1934. Decree dismissing Bill of Complaint filed.
" 5, " Petition for appeal to U. S. Supreme Court and Decree granting appeal filed.
" 5, " Assignments of Error and Prayer for Reversal filed.
" 5, " Statement as to jurisdiction of appeal filed.
" 5, " Citation to Supreme Court of the United States allowed and issued.

[fol. 3]

Apr. 10, 1934. Bond sur appeal in $250, with American Surety Company of New York surety, and Decree approving bond filed.
" 16, " Citation returned: "service accepted" and filed.
" 16, " Notice as to opposing statement of jurisdiction filed.
" 16, " Proof of service of papers pursuant to Rule 12 filed.
" 18, " Stipulation of counsel as to transcript of record sur appeal filed.
" 25, " Waiver of jurisdiction filed.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Nov. 23, 1932

To the Honorable the Judges of the said Court:

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, brings this bill of complaint against the Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania; and thereupon complains and says:

1. Plaintiff was at all times hereinafter mentioned and still is a banking corporation with trust powers, duly or-

ganized and existing under the law of the State of New York.

2. Defendant, William A. Schnader, is the duly appointed and qualified Attorney General of the State of Pennsylvania; and is a citizen of the United States, and a resident of the City of Philadelphia, County of Philadelphia, State of Pennsylvania and Eastern District of said State.

3. Defendant, Leon D. Metzger, is the duly appointed and qualified Secretary of Revenue of the Commonwealth of Pennsylvania and as such is the administrative head of the Department of Revenue of said Commonwealth; and is a citizen of the United States, and a resident of Harrisburg, Dauphin County, State of Pennsylvania, and Middle District of said State.

4. The matter in controversy in this case, exclusive of interest, exceeds the sum or value of Three Thousand Dollars ($3,000).

5. Thomas B. Clarke, a citizen of the United States and a resident of, and legally domiciled in, the Borough of Manhattan, City, County and State of New York, died on the 18th day of January, 1931, leaving a will and codicils thereto which were duly admitted to probate as the last Will and Testament of said Thomas B. Clarke by the Surrogate's Court of New York County to which court jurisdiction in that behalf appertained, on the 27th day of January, 1931, and letters testamentary thereunder duly issued to the said City Bank Farmers Trust Company, and said letters still remain in full force and effect. Copy of said will and codicils are hereto annexed and made a part hereof, marked "Exhibit A".

6. At the time of said Thomas B. Clarke's death, there was on exhibition in the Pennsylvania Museum and School of Industrial Art at Philadelphia, a collection of seventy-nine (79) early American portraits which he had assembled over a period of twenty or thirty years and had loaned to the Museum on the occasion of the formal opening of the new Museum Building on the Parkway, in March, 1928. Said Thomas B. Clarke had no other property located in [fol. 5] Pennsylvania or taxable therein at the time of his death.

7. Said collection of paintings had an estimated market value on the date of death of $714,750.00.

8. The plaintiff is informed, believes and therefore avers that said collection of early American portraits had been loaned to the Museum for the purpose of free exhibition to the public, at the request of Dr. Fiske Kimball, Director of the Museum, who was an intimate friend of the deceased, Thomas B. Clarke; that no consideration was paid or intended to be paid to said Thomas B. Clarke for such loan, that there was no written agreement respecting the loan, which was entirely an oral transaction; but that it was understood by and between Thomas B. Clarke and said Dr. Fiske Kimball that the pictures should be returned to the owner at any time upon his request.

9. The plaintiff is informed, believes and therefore avers that on several occasions subsequent to the date of the original loan, said Thomas B. Clarke suggested the return of said paintings but under pressure from Dr. Fiske Kimball to extend his loan because of the great appreciation shown by the public thereof, said Clarke orally consented from time to time, to leave the paintings temporarily at the Museum, and thus, said portraits were there on display at the time of Thomas B. Clarke's death.

10. The plaintiff is informed, believes and therefore avers that said, The Pennsylvania Museum and School of Industrial Art, is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania, and has secured a substantial portion of works of art therein displayed to the public by voluntary loans from non-resident philanthropists; and such accommodation loans of works of art, none of which were intended or regarded as permanent loans to said The Pennsylvania Museum and School of Industrial Art, have been continued for an average period considerably longer than the period from the date of the original loan in question to the death of the said Thomas B. Clarke.

11. Under the will of said Thomas B. Clarke, deceased, as amended by the second codicil thereto, the executor was directed to sell all of the decedent's property, including [fol. 6] the said collection of portraits, and after payment of certain legacies and the setting up of certain trusts the

residuary estate was bequeathed to said City Bank Farmers Trust Company, in trust, to collect and pay the income from one-half thereof to the testator's son for life and upon the said son's death, to pay the principal of said one-half part to the son's issue, or in default of issue, to certain charities named; and as to the other half, to divide the same into four equal parts and to collect and pay the income of three of said parts, respectively, to three relatives of the testator, and upon the death of each such life beneficiary to pay the principal of his or her share to his or her issue, and to pay and deliver the principal of the fourth such part to certain nieces of the testator.

12. Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, provides in part as follows:

"Section 1. Be it enacted, &c., That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:

(a) When the transfer is by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situated within this Commonwealth or elsewhere.

(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a nonresident of the Commonwealth at the time of his death."

Said tax is imposed by said Act at the rate of 2% of value on transfers to lineal descendants and certain other close relatives and at the rate of 10% on transfers to collaterals and all others; except that any buildings, grounds, books, manuscripts, curios, pictures, statuary or other works of [fol. 7] art, specimens of natural history or other scientific collections passing by will to any municipality, corporation, or unincorporated body for the sole use of the public by

way of free exhibition within the State of Pennsylvania, are not subject to any inheritance tax by express provision of the Act of July 9, 1919, P. L. 794, as amended by the Act of June 12, 1931, P. L. 553.

13. Under the provisions of the Act of April 9, 1929, P. L. 343, Art. XIV, Sec. 1401; 72 P. S. § 1401, said inheritance tax is apparently a lien on the property transferred subject to such tax, from the date of settlement until the tax is paid or satisfied, such lien being limited to the property chargeable therewith.

14. The procedure for the collection of transfer inheritance taxes on transfers from estates of non-resident decedents as provided by Section 1201 of said Act of April 9, A. D. 1929, P. L. 343, 72 P. S. § 1202, is that the Department of Revenue whenever the occasion may require, shall appoint an appraiser to appraise the value of such property if subject to tax; such appraiser shall forthwith give notice by mail to interested parties of the time and place when and where he will appraise such property, at which time he shall truly appraise the property for taxation and make report thereof to the Department of Revenue in writing; and the Department of Revenue shall immediately give notice to all interested parties, and "any person not satisfied with the appraisement made by an appraiser appointed by the Department of Revenue may appeal within 30 days to the Court of Common Pleas of Dauphin County on paying or giving security to pay all costs, together with whatever tax shall be fixed by the Court. Upon such appeal, the Court may determine all questions of valuation, and the liability of the appraised estate for such tax subject to the right of appeal to the Supreme or Superior Court."

And it is provided in Section 1406 of the Act that the Department of Justice may bring suit at law or in equity in any court in the Commonwealth to recover such taxes "and a remedy by means of such suit is hereby provided, whether it be now authorized by law or not".

And it is further provided in Section 203 (h) of said Act that the Department of Revenue shall have the power and [fol. 8] its duty shall be to collect the transfer inheritance tax payable on estates of non-resident decedents.

Section 503 of said Act provides the only relief after payment of the tax by allowing a petition for refund to the

Board of Finance and Revenue, an administrative Board within the Department of Revenue; but provides that the action of the Board on such petition shall be final and thereby denies an appeal from its decision to the courts. The Act makes no provision for interest on refunds granted and plaintiff is advised, believes and therefore avers that in practice no interest is allowed thereon.

15. On March 25, 1931, plaintiff, through its attorneys, disclosed the facts involved in this case to Mr. Linn L. Reist, the proper official in the Department of Revenue in charge of the appraisal, assessment and collection of inheritance taxes on non-resident estates, and, by letters dated March 26th and April 27, 1931, to the defendant, William A. Schnader.

16. On April 7, 1931, plaintiff's attorneys in Philadelphia, received the following notice:

"Commonwealth of Pennsylvania, Department of Revenue

Harrisburg, April 6th, 1931.

"This is full and sufficient notice that an official appraisement of the Pennsylvania assets belonging to the Estate of Thomas B. Clarke, late of New York City, will be held in P.M.
the office of the Secretary of Revenue on Monday morning, 2-30
April 20th, 1931, at Eleven o'clock.
Harry T. Shadduck, Appraiser. Harry T. Shadduck."

17. Under date of April 13, 1931, defendant, William A. Schnader, addressed a letter to plaintiff's counsel in Philadelphia, insisting upon making a formal record by filing a return with the Department of Revenue and appearing before the appraiser at the hearing set and described in the preceding paragraph.

18. Pursuant to the said instructions of the defendant, William A. Schnader, plaintiff filed under protest with the [fol. 9] Department of Revenue at Harrisburg, Pennsylvania, on April 20, 1931, a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions". The material parts of said return are as follows:

"5. That the total gross value of the real estate and the goods, wares and merchandise within the Commonwealth of Pennsylvania, and of the shares of stock of corporations of the Commonwealth of Pennsylvania and National Banking Associations located therein, of which the decedent died possessed, amounted to the sum of $—o—, a complete inventory whereof is attached as Schedule D. See, however, items included in Schedule D under protest."

"Schedule D

"79 Portraits by early American artists loaned to Pennsylvania Museum of Art at Philadelphia, listed and described in appraisal affidavit of Clarence J. Dearden hereto annexed $714,750.00.

"Some time prior to his death the decedent loaned the above described paintings to the Pennsylvania Museum of Art at Philadelphia for purposes of public exhibition. These paintings have been and still are exhibited in connection with a number of other portraits by early American artists which are the property of The Art House, Inc., a New York corporation controlled by the decedent. The loan of the decedent's paintings was made at the request of Mr. Fiske Kimball, Director of the Pennsylvania Museum, and the arrangements were informal. No written contract or other agreement was made and no definite time was fixed as the duration of the loan. No consideration was paid to Mr. Clarke for the loan. It was understood that Mr. Clarke could recall the paintings at any time. It happened that the paintings were still physically located in Philadelphia at the time of decedent's death, but it is respectfully submitted that they were only temporarily in the State of Pennsylvania and had no actual situs therein for purpose of taxation.

"The said 79 paintings were the only property of the decedent within the Commonwealth of Pennsylvania at the time of his death."

19. On April 20, 1931, the scheduled hearing was held in Harrisburg by Harry T. Shadduck, an appraiser in the [fol. 10] Department of Revenue, since resigned, at which hearing plaintiff was represented by counsel and denied the right of the Commonwealth of Pennsylvania to appraise, assess and collect a tax upon the aforesaid collection of

paintings temporarily in the Commonwealth of Pennsylvania at the time of decedent's death. Said appraiser referred the question of taxability of the aforesaid paintings to the Department of Justice, of which defendant, William A. Schnader, is head, for a determination. Pending such decision, he made no attempt to appraise the taxable value of the estate but postponed said hearing from day to day to a future undetermined day to be held after the Department of Justice had passed upon the legality of the proposed tax, and after notice to the parties.

20. Throughout the spring of 1932, in response to repeated requests of plaintiff for an immediate determination of tax liability, the defendant, William A. Schnader, orally advised plaintiff through its counsel that the Department of Justice was withholding determination of the legal question of liability pending an attempt on its part to work out a reciprocity agreement with the State of New York concerning the taxation of movable tangible property under circumstances such as those involved in this case.

21. Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1931, from the New York State Tax Commission that the said collection of 79 paintings had its situs in New York and was subject to the New York estate tax and that an extension of time to pay said tax pending the determination of the legal question involved in Pennsylvania had been refused. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid to the State of New York on July 15, 1932, an estate tax amounting to $69,500 on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500.00.

22. Immediately after such payment to New York, plaintiff again through its counsel took up the question with [fol. 11] defendant, William A. Schnader, who orally advised plaintiff that its claim of non-taxability in Pennsylvania would be denied.

23. The plaintiff is advised by its counsel, believes and therefore avers, that if the said section 1 of the Act of June 20, 1919, P. L. 521, as amended (paragraph 12, supra) be construed to impose an inheritance tax upon the transfer by death of the non-resident owner thereof, of the said 79 paintings, merely because they were temporarily "within this Commonwealth" at the time of decedent's death, it is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

24. The plaintiff is advised by its counsel, believes and therefore avers, that if said statute be construed as not applying to property temporarily within the Commonwealth at death, then the threatened appraisal, assessment and collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

25. The plaintiff avers that the threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the unlawful failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate for over a year and a half, has caused and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator.

[fol. 12] 26. The plaintiff is advised by its counsel, believes and therefore avers, that it has no adequate remedy at law in that the statutes of Pennsylvania make no provision for

bringing suit in the courts of that state for the refund of inheritance taxes overpaid but only provide, as aforesaid, for an application for a refund to an administrative board from whose decision there is no appeal and even if favorably decided by such board, no interest is allowed on any refund granted; in that the only remedy provided by the statutes of Pennsylvania prior to payment is a statutory form of appeal to the Dauphin County Court where a bond must be posted covering the full amount of tax and costs of suit and there is no provision for the restitution of the cost of such bond, which, in this case, would amount to a large sum of money, even if plaintiff should succeed before such Court; and in that the plaintiff has no adequate remedy at law in the federal courts, to which it is entitled because of the diversity of citizenship between the parties to this suit.

Wherefore the plaintiff is in need of equitable relief and prays:

A. That an injunction issue temporary until hearing and perpetual thereafter enjoining and restraining the defendant, Leon D. Metzger, and his and each of his deputies, officers, agents, servants and employees and any and every person in the Department of Revenue of the Commonwealth of Pennsylvania, acting under and by virtue of his authority, from in any way completing or attempting to complete the appraisement, assessment and collection of inheritance taxes from the plaintiff in the estate of Thomas B. Clarke now being undertaken and from refusing to issue a tax waiver to the plaintiff covering the property set forth above.

B. That an injunction issue temporary until hearing and perpetual thereafter enjoining and restraining the defendant, William A. Schnader, and his and each of his deputies, officers, agents, servants and employees and any and every person in the Department of Justice of the Commonwealth of Pennsylvania, acting under and by virtue of his authority, from enforcing the provisions of the said section 1 of the Pennsylvania Act of June 20, 1919, P. L. 521, as [fol. 13] amended, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of inheritance taxes upon the transfer by death of

said Thomas B. Clarke, deceased, of the aforesaid collection of 79 paintings.

C. That a temporary restraining order be issued against defendant, Leon D. Metzger, and each of his officers, agents, servants and employees in the Department of Revenue from proceeding with the appraiser's hearing aforesaid and from making a tax appraisement and assessment in this estate.

D. That such other and further relief be granted as to your Honorable Court shall seem meet.

E. That a duplicate writ may issue out of and under the seal of this Honorable Court directed to the United States Marshal of the Middle District of the State of Pennsylvania for service upon the defendant, Leon D. Metzger, said duplicate writ therein and thereby commanding the said defendant on a certain day therein to be named and under a certain penalty to be and appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide by any order, direction and decree which may be made against him in the premises.

And the plaintiff will ever pray, etc.

Leslie M. Swope, Henry S. Drinker, Jr., H. Gordon McCouch, Attorneys for plaintiff. King, Barr & Robbins, 60 Broadway, New York, N. Y., of Counsel.

Duly sworn to by Charles C. Jordan. Jurat omitted in printing.

EXHIBIT "A" TO BILL OF COMPLAINT

I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory, do make, publish and declare the following to by my Last Will and Testament, hereby revoking all other and former wills by me at any time made:

[fol. 14] First. I direct that all my just debts and funeral expenses be paid as soon after my decease as possible, and I direct that all transfer and inheritance taxes shall be paid out of my residuary estate.

Second. I direct my Executor to convert into money all of my estate, both real and personal, and to that end to sell at public or private sale my house No. 22 East 35th Street, New York City, and all its contents, also my property known as "Lindenland" on the main road at Hayground, Southampton Township, Long Island, New York, consisting of about fifteen acres of land with the house, garage and other buildings thereon, together with all the contents thereof, also my unimproved property on Lily Pond Lane, Easthampton, Long Island, New York. It is my wish that my Executor shall exercise its judgment as to the time and manner of effecting the sale of my property, and I advise my Executor to consult with my son Thomas Benedict Clarke, Jr., with my friend James W. Ellsworth, Esq., and with Mr. Clarence J. Dearden and Miss Alice T. Bay, President and Treasurer respectively of The Art House, Inc., as to the disposal of my artistic effects. And in order to carry out the provisions of this paragraph of my will, I hereby give and grant unto my Executor full power to sell any or all of my real property.

Third. Out of the proceeds of the sale of the property referred to in Article Second and out of all other funds belonging to my estate available for that purpose I direct that the following payments be made:

1. I give and bequeath to my son Thomas Benedict Clarke, Jr., the sum of Two hundred and fifty thousand dollars ($250,000).

2. I give and bequeath to my daughter-in-law Elsie Ferguson Clarke, the sum of Twenty-five thousand dollars ($25,000).

3. I give and bequeath to each of my brothers and sisters, Mary Ellen Keys, Frances Anna Merrifield, William Addison Clarke and Paul Irving Clarke, who may survive me, the sum of Five thousand dollars ($5,000).

4. I give and bequeath to Clarence J. Dearden, the sum of Five thousand dollars ($5,000), to Alice T. Bay, the sum [fol. 15] of Three thousand dollars ($3,000), and to Charles X. Harris the sum of Two thousand ($2,000); the said persons being at present the President, Treasurer and Secretary respectively of The Art House, Inc., a corporation hav-

ing its principal place of business at 12 East 41st Street, in the Borough of Manhattan, City of New York.

5. I give and bequeath to Alfred Thomas and Rose Thomas, his wife, who have been faithful servants in my household for many years, each the sum of One thousand dollars ($1,000) if still in my employment at the time of my death.

6. I give and bequeath the sum of Two hundred thousand dollars ($200,000) to The Farmers' Loan and Trust Company, in trust, nevertheless, for the following uses and purposes, that is to say: to divide the same into four equal and separate shares which shall be held, managed and disposed of as follows, respectively, to wit:

(a) One of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my sister Mary Ellen Keys during her life. Upon her death, or in case she should die before me, upon my death, to pay the principal of said separate share to her issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sister Frances Anna Merrifield in equal shares per stirpes.

(b) The second of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my sister Frances Anna Merrifield during her life. Upon her death, or in case she should die before me, upon my death, to pay the principal of said separate share to her issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sister Mary Ellen Keys in equal shares per stirpes.

(c) The third of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect [fol. 16] the rents, income and profits therefrom and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my brother William Addison Clarke during his life. Upon his death, or

in case he should die before me, upon my death, to pay the principal of said separate share to his issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sisters Mary Ellen Keys and Frances Anna Merrifield in equal shares per stirpes.

(d) The fourth of said separate shares I direct my said trustee to invest and reinvest and to collect the rents, income and profits therefrom; and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my brother Paul Irving Clarke during his life. Upon his death, or in case he should die before me, upon my death, to pay over said income to his wife Eleanor during her life as long as she remains unmarried. Upon her death or remarriage, after the death of my said brother, I direct my said trustee to pay the principal of said separate share to the issue then surviving of my said brother by his wife Eleanor in equal shares per stirpes. In case there shall be no such issue surviving at the time when the principal of said separate share becomes payable, I direct my said trustee to pay the said principal to the issue then surviving of my sisters, May Ellen Keys and Frances Anna Merrifield in equal shares per stirpes.

Fourth. All the rest, residue and remainder of my estate I direct my Executor to divide into two equal parts, and to pay and deliver one of such equal parts to The Farmers' Loan and Trust Company, in trust, nevertheless, for the following uses and purposes, that is to say, to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses to pay over the net income to my son Thomas Benedict Clarke, Jr., during his life. Upon his death, or in case he should die before me, upon my death, to pay the principal of said equal part of my residuary estate, to his issue then surviving in equal shares per stirpes, or in default of such issue then surviving to pay the said principal in equal shares to the Na- [fol. 17] tional Academy of Design of New York and the Fifth Avenue Hospital of New York City.

I direct my Executor to pay and deliver the other of such equal parts of my residuary estate to The Farmers' Loan and Trust Company, to be added to the sum which I have hereinbefore given to it by subdivision (6) of Article Third

of this my will and to be held by it upon the trusts therein established.

Fifth. I hereby nominate, constitute and appoint The Farmers' Loan and Trust Company, whose principal place of business is at 22 William Street, Borough of Manhattan, New York City, Executor of this my Last Will and Testament, and Trustee of all the trusts herein created.

In witness whereof I have hereunto subscribed my name and affixed my seal at the City of New York this twelfth day of May, One thousand nine hundred and twenty-two.

Thomas Benedict Clarke. (L. S.)

The foregoing instrument was at the date thereof signed, sealed, published and declared by the said Thomas Benedict Clarke, the testator therein named, as and for his Last Will and Testament in our presence and in the presence of each of us, the undersigned, and we thereupon at the same time, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names and residences as subscribing witnesses at 7 East 40th Street New York City.

Wolcott P. Robbins, 141 East 71st Street, New York City. William D. Bickham, Palmer Ave. Philipse Manor, N. Y.

I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory, do hereby make, publish and declare the following as and for a Codicil to my Last Will and Testament, which bears date the 12th day of May, One Thousand nine hundred and twenty-two, that is to say:

First. I hereby revoke subdivision 2 of Article Third of said Will.

Second. I hereby re-publish, ratify and confirm my said Last Will and Testament in all respects, except as altered and modified by said Codicil.

[fol. 18] In witness whereof I have hereunto set my hand and seal this 13th day of June, One thousand nine hundred and twenty-three, in the City, County and State of New York.

Thomas Benedict Clarke. (L. S.)

The foregoing instrument was on the day of the date thereof in our presence signed, sealed, published and declared by the above named Thomas Benedict Clarke to be a Codicil to his Last Will and Testament dated May 12, 1922, and we thereupon at his request, in his presence and in the presence of each other hereunto signed our names as subscribing witnesses.

William G. Owens, 85 Audubon Ave., N. Y. City.
Wolcott P. Robbins, 911 Park Avenue, New York City.

I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory do hereby make, publish and declare the following as and for a Second Codicil to my Last Will and Testament, which bears date the twelfth day of May, One thousand nine hundred and twenty-two.

First. The property described in Article Second of my said Will as "my unimproved property on Lily Pond Lane, East Hampton, Long Island, New York" has been sold by me since the date of my said Will.

I wish to amend the advice which by Article Second of my said Will I have given to my Executors as to the persons with whom they shall consult in regard to the disposal of my artistic effects by omitting the name of James W. Ellsworth, Esq., who has died since the date of said Will.

Second. I hereby revoke subdivision 3 of Article Third of my said Will and in lieu of said subdivision 3, and with the same effect as though part of said Article Third of said original Will I provide as follows:

3. I give and bequeath to my sister, Mary Ellen Keys, and to my brother, William Addison Clarke, each the sum of Five thousand dollars ($5,000).

[fol. 19] I give and bequeath the sum of Two thousand five hundred dollars ($2,500) each to my nieces, Ruth and Pauline Merrifield, daughters of my sister, Frances Anna Merrifield.

Third. I amend subdivision 4 of Article Third of my said Will by increasing the legacy therein given to Clarence J. Dearden from Five thousand dollars ($5,000) to

Six thousand dollars ($6,000) and by increasing the legacy therein given to Alice T. Bay from Three thousand dollars ($3,000) to Five thousand dollars ($5,000). In addition to said legacy, I give and bequeath to said Alice T. Bay an annuity of One thousand dollars ($1,000) per annum, payable in equal quarterly instalments, the first payment to be made one year after my death.

Fourth. I amend subdivision 5 of Article Third of my said Will by increasing the legacy therein given to Alfred Thomas from One thousand dollars ($1,000) to One thousand five hundred dollars ($1,500).

Fifth. I give and bequeath to William J. Kain, now employed by The Art House, Inc., the sum of Two thousand dollars ($2,000).

Sixth. I give and bequeath to my cousin, Jessie Mather, of Slingerlands, Albany County, New York, the sum of Two thousand five hundred dollars ($2,500), and in addition thereto an annuity of Six hundred dollars ($600) per annum, payable in equal monthly instalments commencing one month after my death.

Seventh. My sister, Frances Anna Merrifield, having died since the date of my said Will, I direct that the fund which by subdivision 6-(b) of Article Third of my said Will is directed to be held in trust for her together with such part of my residuary estate as may be added to said fund pursuant to Article Fourth of my said Will, shall not be held in trust but shall upon my death be paid in equal shares to my nieces, Ruth and Pauline Merrifield, daughters of my said sister Frances, or if only one of them shall survive me, then to the survivor of them.

Eighth. My brother, Paul Irving Clarke, having died since the date of my said Will, I amend subdivision 6-(d) of Article Third of my said Will so that the fund which [fol. 20] was thereby directed to be held in trust for him, together with such part of my residuary estate as may be added thereto pursuant to Article Fourth of my said Will, shall be held by my Trustee in trust and the income therefrom paid to Eleanor Clarke, widow of my said brother Paul, during her life as long as she remains unmarried. Upon her death or remarriage, I direct my said Trustee to pay the principal of said separate share to Mildred Kien-

busch, daughter of my said brother Paul, now the wife of Carl Otto Kienbusch, of 12 East 74th Street, New York City. In case my said niece is not living at the time when the principal of said separate share becomes payable, I direct my said Trustee to pay the said principal to the issue then surviving of my two sisters Mary Ellen Keyes and Frances Anna Merrifield, in equal shares per stirpes.

Ninth. The Farmers Loan and Trust Company named in my said Will as Executor and Trustee, being now known as City Bank Farmers Trust Company, I hereby ratify and confirm the appointment of said City Bank Farmers Trust Company as Executor of my Last Will and Testament and Trustee of all the trusts created therein and by this Codicil.

Tenth. I hereby re-publish, ratify and confirm my said Last Will and Testament dated May 12, 1922, in all respects, except as altered or modified by the First Codicil thereto bearing date June 13, 1923, and by this Second Codicil thereto.

In witness whereof I have hereunto set my hand and seal this Ninth day of January, 1931, in the City, County and State of New York.

Thomas B. Clarke. (L. S.)

The foregoing instrument was on the day of the date thereof in our presence signed, sealed, published and declared by the above named Thomas Benedict Clarke to be a Second Codicil to his Last Will and Testament dated May 12, 1922, and we thereupon at his request, in his presence and in the presence of each other hereunto signed our names as subscribing witnesses.

Wolcott P. Robbins, 215 East 72nd Street, New York City. John D. Graves, 9024 212 Place, Queens Village, New York. Robert B. Meigs, 341 W. Dudley Ave., Westfield, N. J.

[fol. 21] [Endorsed:] Exhibit A. Last will and testament of Thomas Benedict Clarke. Dated May 12th, 1922. Codicil. Dated June 13th, 1923. Second codicil. Dated January 9th, 1931. Admitted to Probate by the New York County Surrogates Court January 27, 1931. Letters testamentary issued January 28, 1931.

IN UNITED STATES DISTRICT COURT

[Title omitted]

INJUNCTION AFFIDAVIT—Filed Nov. 23, 1932

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Charles C. Jordan, being first duly sworn according to law, deposes and says:

1. That he is a Trust Officer of City Bank Farmers Trust Company, the plaintiff in the above entitled action; that he is authorized to make this injunction affidavit on its behalf and now so does; and that the matters herein averred, in so far as they may be on affiant's own knowledge are true and correct, and in so far as they may be upon information and belief, affiant believes them to be true and correct.

2. The above-named plaintiff was at all times hereinafter mentioned and still is a banking corporation with trust powers, duly organized and existing under the law of the State of New York.

3. Thomas B. Clarke, a citizen of the United States and a resident of, and legally domiciled in, the Borough of Manhattan, City, County and State of New York, died on the 18th day of January, 1931, leaving a will and codicils thereto which were duly admitted to probate as the Last Will and Testament of said Thomas B. Clarke by the Surrogates Court of New York County, to which court jurisdiction in that behalf appertained, on the 27th day of January, 1931, and letters testamentary thereunder duly issued to the said City Bank Farmers Trust Company, and said letters still remain in full force and effect.

[fol. 22] 4. At the time of said Thomas B. Clarke's death, there was on exhibition in the Pennsylvania Museum and School of Industrial Art at Philadelphia, a collection of seventy-nine (79) early American portraits which he had assembled over a period of twenty or thirty years and had loaned to the Museum on the occasion of the formal opening of the new Museum Building on the Parkway, in March, 1928. Said Thomas B. Clarke had no other property lo-

cated in Pennsylvania at the time of his death or taxable therein.

5. Said collection of paintings had an estimated market value on the date of death of $714,750.00.

6. Affiant is informed, believes and therefore avers that said collection of early American portraits had been loaned to the Museum for the purpose of free exhibition to the public, at the request of Dr. Fiske Kimball, Director of the Museum, who was an intimate friend of the deceased, Thomas B. Clarke. No consideration was paid or intended to be paid to said Thomas B. Clarke for such loan. There was no written agreement respecting the loan, which was entirely an oral transaction; but it was understood by and between said Thomas B. Clarke and said Dr. Fiske Kimball that the pictures should be returned to the owner at any time upon his request.

7. Affiant is informed, believes and therefore avers that on several occasions subsequent to the date of the original loan, said Thomas B. Clarke suggested the return of said paintings but under pressure from Dr. Fiske Kimball to extend his loan because of the great appreciation shown by the public thereof, said Clarke orally consented from time to time, to leave the paintings temporarily at the Museum, and thus, said portraits were there on display at the time of Thomas B. Clarke's death.

8. Affiant is informed by counsel for plaintiff, believes and therefore avers that under the terms of Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, an inheritance tax is imposed upon transfers of goods, wares or merchandise, "within this Commonwealth" belonging to a non-resident, at rates of 2 and 10% depending upon the relationship of the heirs, legatees and beneficiaries.

[fol. 23] 9. Under the Will of said Thomas B. Clarke, deceased, the aforesaid collection of portraits passed as a part of his residuary estate to lineals and collaterals so that, if said property had a taxable situs in Pennsylvania at the time of death, a Pennsylvania inheritance tax would arise in a sum exceeding $3,000.00.

10. Affiant is informed by counsel for plaintiff, believes and therefore avers, that under the terms of the Act of April 9, 1929, P. L. 343, Article XIV, sec. 1401, 72 P. S. § 1401, said inheritance tax is apparently a lien on the property transferred subject to such tax, from the date of settlement until the tax is settled or satisfied, such lien being limited to the property chargeable therewith.

11. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it is the duty of the defendant, Leon D. Metzger, to have the aforesaid property of plaintiff appraised, assessed and an inheritance tax thereon collected under the terms of the statute aforementioned and under the provisions of the Pennsylvania statutes providing for the collection of inheritance taxes on the estates of non-residents. Whether this be his legal duty or not, said Leon D. Metzger is actually proceeding at the present time to appraise, assess and collect such a tax thereon.

12. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it is the duty of the defendant, William A. Schnader, to enforce the statutes of Pennsylvania, and in particular the statute aforementioned which imposes a transfer inheritance tax upon property temporarily within the Commonwealth at the time of the owner's death and to proceed by suit at law or in equity to collect such taxes. Whether this be his legal duty under the statute or not, said William A. Schnader is threatening at the present time to proceed against the plaintiff for the collection of inheritance taxes upon the collection of portraits aforementioned.

13. On March 25, 1931, plaintiff, through its attorneys, disclosed the facts involved in this case to Mr. Linn L. Reist, the proper official in the Department of Revenue in charge of the appraisal, assessment and collection of inheritance taxes on non-resident estates, and by letters dated March 26th and April 27, 1931, to the defendant, William A. Schnader.

[fol. 24] 14. On April 7, 1931 plaintiff's attorneys in Philadelphia received the following notice:

"Commonwealth of Pennsylvania, Department of Revenue

Harrisburg, April 6th, 1931.

"This is full and sufficient notice that an official appraisement of the Pennsylvania assets belonging to the estate of Thomas B. Clarke, late of New York City, will be held in the office of the Secretary of Revenue on Monday [morning],* April 20th, 1931, at [eleven]* o'clock. P. M. 2-30

(S.) Harry T. Shadduck, Appraiser. Harry T. Shadduck."

15. Under date of April 13, 1931 defendant, William A. Schnader, addressed a letter to plaintiff's counsel in Philadelphia, insisting upon making a formal record by filing a return with the Department of Revenue and appearing before the appraiser at the hearing set and described in the preceding paragraph.

16. Pursuant to the said instructions of the defendant, William A. Schnader, plaintiff filed under protest with the Department of Revenue at Harrisburg, Pennsylvania, on April 20, 1931 a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions"; that the material parts of said return are as follows:

"5. That the total gross value of the real estate and the goods, wares and merchandise within the Commonwealth of Pennsylvania, and of the shares of stock of corporations of the Commonwealth of Pennsylvania and National Banking Associations located therein, of which the decedent died possessed, amounted to the sum of $—, a complete inventory whereof is hereto attached as Schedule D. See, however, item included in Schedule D under protest."

"Schedule D

"79 Portraits by early American artists loaned to Pennsylvania Museum of Art at Philadelphia, listed and de-

[*Erased in copy.]

[fol. 25] scribed in appraisal affidavit of Clarence J. Dearden hereto annexed $714,750.00.

"Some time prior to his death the decedent loaned the above described paintings to the Pennsylvania Museum of Art at Philadelphia for purposes of public exhibition. These paintings have been and still are exhibited in connection with a number of other portraits by early American artists which are the property of The Art House, Inc., a New York corporation controlled by the decedent. The loan of the decedent's paintings was made at the request of Mr. Fiske Kimball, Director of the Pennsylvania Museum, and the arrangements were informal. No written contract or other agreement was made and no definite time was fixed as the duration of the loan. No consideration was paid to Mr. Clarke for the loan. It was understood that Mr. Clarke could recall the paintings at any time. It happened that the paintings were still physically located in Philadelphia at the time of decedent's death, but it is respectfully submitted that they were only temporarily in the State of Pennsylvania and had no actual situs therein for purpose of taxation.

"The said 79 paintings were the only property of the decedent within the Commonwealth of Pennsylvania at the time of his death."

17. On April 20, 1931, the scheduled hearing was held in Harrisburg by Harry T. Shadduck, an appraiser in the Department of Revenue, since resigned, at which hearing plaintiff was represented by counsel and denied the right of the Commonwealth of Pennsylvania to appraise, assess and collect a tax upon the aforesaid collection of paintings temporarily in the Commonwealth of Pennsylvania at the time of decedent's death; that said appraiser referred the question of taxability of the aforesaid paintings to the Department of Justice, of which defendant, William A. Schnader, is head, for a determination; that pending such decision, he made no attempt to appraise the taxable value of the estate but postponed said hearing from day to day to a future undetermined day to be held after the Department of Justice had passed upon the legality of the proposed tax, and after notice to the parties.

18. Throughout the spring of 1932, in response to repeated requests of plaintiff for an immediate determina-

[fol. 26] tion of tax liability, the defendant William A. Schnader, orally advised plaintiff through its counsel that the Department of Justice was withholding determination of the legal question of liability pending an attempt on its part to work out a reciprocity agreement with the State of New York concerning the taxation of moveable tangible property under circumstances such as those involved in this case.

19. Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1931 from the New York State Tax Commission that the said collection of 79 paintings had its situs in New York and was subject to the New York estate tax and that an extension of time to pay said tax pending the determination of the legal question involved in Pennsylvania had been refused. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid to the State of New York on July 15, 1932 an estate tax amounting to $69,500 on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500.00.

20. Immediately after such payment to New York, plaintiff again through its counsel took up the question with defendant, William A. Schnader, who orally advised plaintiff that its claim of non-taxability in Pennsylvania would be denied.

21. Affiant is informed by plaintiff's counsel, believes and therefore avers, that if the said section 1 of the Act of June 20, 1919, P. L. 521, as amended (paragraph 9, supra) be construed to impose an inheritance tax upon the transfer by death of the non-resident owner thereof, of the said 79 paintings, merely because they were temporarily "within this Commonwealth" at the time of decedent's death, it is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 27] 22. Affiant is informed by plaintiff's counsel, believes and therefore avers, that if said statute be construed as not applying to property temporarily within the Commonwealth at death, then the threatened appraisal, assessment and collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

23. The threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the unlawful failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate for over a year and a half, has and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator.

24. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it has no adequate remedy at law in that the statutes of Pennsylvania make no provision for bringing suit in the courts of that state for the refund of inheritance taxes overpaid but only provide for an application for a refund to an administrative board from whose decision there is no appeal and even if favorably decided by such board, no interest is allowed on any refund granted; in that the only remedy provided by the statutes of Pennsylvania prior to payment is a statutory form of appeal to the Dauphin County Court where a bond must be posted covering the full amount of tax and costs of suit and there is no provision for the restitution of the cost of such bond, which, in this case, would amount to a large sum of money, even if plaintiff should succeed before such Court; and in

[fol. 28] that the plaintiff has no adequate remedy at law in the federal courts' to which it is entitled because of diversity of citizenship between the parties to this suit.

All of the foregoing facts affiant avers he expects the plaintiff to prove at the hearing in this cause.

Charles C. Jordan.

Sworn to and subscribed before me this 18th day of November, 1932. John D. Graves, Notary Public, Queen Co*l*. No. 2159, Reg. No. 4914. Cert. filed N. Y. Co. 473, Reg. (Certificate of Court Clerk) No. 3-G-318. Comm. ex. 3/3/33.

Clerk's certificate to notary public omitted in printing.

In United States District Court

[Title omitted]

Injunction Affidavit—Filed Nov. 23, 1932

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

Fiske Kimball, being duly sworn according to law, deposes and says that he is Director of the Pennsylvania Museum of Art, Fairmount Park, Philadelphia, Pennsylvania, and has so been connected with the said institution from the year 1925; that the following is a true account of his relations with Mr. Thomas B. Clarke, Deceased, of New York City, N. Y., in connection with the collection of early American portraits on exhibition in the Museum at the time of Mr. Clarke's death.

I was intimately acquainted with the late Mr. Thomas B. Clarke from about the year 1920 down to the date of his death on January 18, 1931. I knew him in New York, where I lived for a time prior to coming to Philadelphia in 1925. I lunched with him frequently at "The Brook" club and we maintained a close friendship which was fostered by our mutual interests in the realm of art.

The new Art Museum was to open its doors in March, 1928, and I was anxious to supplement the exhibition of [fol. 29] paintings with loans from outside sources. I knew

about the collection of early American portraits which had been assembled by Mr. Clarke and had seen various selected groups from the collection at different times. The thought occurred to me that Mr. Clarke might lend his collection to the Museum as a personal favor to me and to assist in making the opening of the Museum an occasion of consequence in the world of art. I, therefore, made a social visit to Mr. Clarke in the month of November, 1927, and, very much to his surprise, requested that he lend his collection of portraits to the Museum temporarily for the purposes stated. I am sure that Mr. Clarke never contemplated making this loan prior to my request and I feel confident that he would not have made the loan were it not for our close friendship. After considering the matter for some time Mr. Clarke very kindly agreed to lend the pictures to the Museum at its opening for free exhibition to the public. There was no written agreement respecting the loan, which was entirely an oral transaction, except that the Museum issued its usual printed loan receipt, a copy of which is appended. There was no consideration for the loan. The term originally contemplated was about six months, although there was no definite understanding regarding the matter. It was understood that the pictures should be returned to Mr. Clarke at any time upon his request. The cost of shipping the pictures to Philadelphia, and the insurance thereon, was borne under an appropriation by the City of Philadelphia for the operation of the Museum, which is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania. The Museum considered the loan a great service to it, and elected Mr. Clarke an Honorary Benefactor. On March 26, 1928, I wrote Mr. Clarke the following letter:

"The Pennsylvania Museum

Office of the Director, Memorial Hall, Fairmount Park

March 26, 1928.

"Dear Mr. Clarke: At its recent meeting our Museum Committee, by special resolution, charged me with the agreeable task of conveying to you formally the thanks and appreciation of the Committee for your magnificent act in [fol. 30] lending to the Museum for its inaugural exhibition your unrivalled collection of early American paintings.

The Committee fully appreciates how great was the generosity of this loan of a collection never seen or shown before in its entirety, and one which surpasses in importance any other collection of American paintings, not only in private hands, but even in the hands of the greatest public institutions. I scarcely need to tell you how much delight it gives me to transmit this resolution to you, and to say how happy and proud we are on this day when the Museum is officially opened to have the Clarke collection as one of its principal treasures.

Sincerely yours, Fiske Kimball, Director.

Thomas B. Clarke, Esq., 22 East 35th Street, New York."

At the same time I secured substantial loans from other outside sources, largely through similar personal connections, to enrich the display at the Museum.

Not only this collection but other collections lent to the Museum at the time were retained by us longer than the original six months contemplated and, in fact, most of them were still on exhibition in the Museum at the time of Mr. Clarke's death. It is very common for loans to museums to be thus extended, with no intention of their being permanent. Recently, I ran through our records and found that in the case of twenty-six collections so lent and returned, the duration of the loan varied from one to forty years, the average time for the twenty-six collections being ten years. I purposely did not remind the lenders to the inaugural exhibition to withdraw their loans, and, if they brought the matter up, I would press them to extend their loans because of the great appreciation shown by the public in visiting the Museum. This was particularly true of the Clarke collection and from time to time I would ask Mr. Clarke to allow the pictures to continue to remain on view with us.

Mr. Clarke was a prominent figure in the world of art and was one of the best known persons in New York City. He was at one time Shep-erd of the Lambs Club and was founder of "The Brook" Club. He had been a collector of Chinese porcelains and other works of art prior to the time he started collecting American historical portraits, which ultimately absorbed all his interest and led him to sell other objects, so that he could purchase more and finer portraits. [fol. 31] It was well known among all persons interested in such subjects that he had this splendid collection of early

American portraits. He had permitted practically all of them to be exhiibted in selected groups from time to time in New York at the Century Club and the Union League Club.

As indicated herteofore, I have, by reason of my New York and other outside associations, been able to secure substantial loans of works of art from owners residing outside of the State of Pennsylvania. The value of such property so lent from time to time, much of which is still on exhibition in the Museum, has amounted to two or three million dollars at least. While such loans are customary among patrons of art, the Pennsylvania Museum of Art has perhaps been unusually successful, both as to the quantity and quality of pictures and other works of art, which it has thus secured temporarily from foreign owners, and no conclusion has even been drawn heretofore that such loans were anything but what they purported to be—temporary deposits for the benefit of the public interested in works of art.

(S.) Fiske Kimball.

Sworn to and subscribed before me this 17th day of November, 1932. My commission expires Mar. 2, 1933. W. A. Schrader, Notary Public. (Seal.)

In United States District Court

[Title omitted]

Motion for Interlocutory Injunction—Filed Nov. 23, 1932

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Upon the bill of complaint herein and upon the annexed affidavits of Charles C. Jordan, verified on the 18th day of November, 1932, and of Fiske Kimball, verified on the 17th day of November, 1932, and upon proceedings had herein, City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, deceased, the complainant above [fol. 32] named makes its application to your Honors for a writ of injunction enjoining and restraining, pending the final judgment in this action, and until the further order of this court, the defendants and each of them, and their —

and each of their deputies, officers, agents, servants and employees, and any and every person acting under and by virtue of their authority in the Department of Justice or in the Department of Revenue of the Commonwealth of Pennsylvania, from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended and supporting statutes, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of said taxes and from refusing to issue a tax waiver to plaintiffs covering the property set forth in said bill of complaint, and complainant prays your Honors to call to your Honors' assistance, to hear and determine this application, two other judges in accordance with the provisions of section 266 of the Judicial Code, and to expedite the hearing of this application, and set the same down for a hearing at the earliest practical date; and for such other and further relief as to the court may seem just and proper in the premises:

Dated at Philadelphia, Nov. 23, 1932.

(S.) Leslie M. Swope, (S.) Henry S. Drinker, Jr., Attorneys for Plaintiff, 1429 Walnut Street, Philadelphia, Pa.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Ex Parte Order

RESTRAINING ORDER—Filed Nov. 25, 1932

This cause came on to be heard upon the motion of City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, the plaintiff in the above entitled cause, for an interlocutory injunction against the Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon [fol. 33] D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, the defendants in the above cause, on the verified bill of complaint and on the affidavits of Charles C. Jordan verified the 18th day of November, 1932,

and of Fiske Kimball, verified on the 17th day of November, 1932, and it appearing to this court that said Bill of Complaint seeks an interlocutory judgment restraining the enforcement of the Act of June 20, 1919, P. L. 521, as amended, by restraining the acts of the Honorable William A. Schnader, Attorney General, and of the Honorable Leon D. Metzger, Secretary of Revenue, in the enforcement of such statute upon the grounds of the unconstitutionality of said statute and on the unconstitutionality of any appraisement, assessment and collection of inheritance taxes against plaintiff pursuant to such statute, as provided by Section 266 of the Judicial Code, it is ordered, adjudged and decreed as follows:

1. The Honorable William H. Kirkpatrick, Judge of the above court, hereby calls to his assistance to hear and determine the application for an interlocutory injunction in this case the Honorable J. Whitaker Thompson, Judge of the Circuit Court of Appeals for the Third Circuit, and the Honorable Oliver B. Dickinson, Judge of the District Court of the United States for the Eastern District of Pennsylvania.

2. It is further ordered, adjudged and decreed, that said defendants appear to show cause, if any they have, on December 2, 1932, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in Room —, Federal Court Building, Philadelphia, why an interlocutory injunction should not issue as prayed for in said bill of complaint, enjoining said defendants and each of them, and their and each of their deputies, officers, agents, servants and employees, and any and every person acting under and by virtue of their authority in the Department of Justice or in the Department of Revenue of the Commonwealth of Pennsylvania, from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken, under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended, and supporting statutes, and from prosecuting or bringing [fols. 34–36] any action at law or in equity against the plaintiff for the collection of said taxes and from refusing to issue a tax waiver to plaintiffs covering the property set forth in said Bill of Complaint.

3. It appearing that immediate and irreparable damage will be caused to said plaintiff by reason of the threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate, in that such threat and acts are seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and are preventing distribution of the estate, and are forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees and in that, once appraised and assessed, the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the property involved and interferes with the proposed sale thereof, unless a temporary restraining order is issued ex parte and without notice against said defendants until the hearing of said application for an interlocutory injunction, it is further ordered, adjudged and decreed that said, the Honorable William A. Schnader, Attorney General, and the Honorable Leon D. Metzger, Secretary of Revenue, be enjoined from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended, and supporting statutes, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of said taxes covering the property set forth in said Bill of Complaint, until said hearing on said application for an interlocutory injunction. Bond sur restraining order in $1,000 to be filed.

Dated at Philadelphia, November 25, 1932, at 10 o'clock A. M.

(S.) W. H. Kirkpatrick, District Judge.

[fol. 37] In United States District Court

[Title omitted]

Answer—Filed Dec. 19, 1932

To the Honorable the Judges of the said Court:

William A. Schnader and Leon D. Metzger, the defendants above named, saving and reserving to themselves all

benefit and advantage of exceptions to the manifold errors, uncertainties and other imperfections in the plaintiff's Bill of Complaint, for answer thereto respectfully show:

1. The averments of the first paragraph of the Bill of Complaint are admitted.

2. The averments of the second paragraph of the Bill of Complaint are admitted.

3. The averments of paragraph 3 of the Bill of Complaint are admitted.

4. The averments of paragraph 4 of the Bill of Complaint are admitted.

5. The averments of paragraph 5 of the Bill of Complaint are admitted.

6. Defendants are advised and believe that the facts stated in paragraph 6 of the Bill of Complaint are true. In further answer defendants aver that prior to their shipment to the Pennsylvania Museum in Philadelphia in March, 1928, only five of the portraits owned by Thomas B. Clarke had been stored in Mr. Clark's residence at 22 East Thirty-fifth Street, New York City. Ten of these portraits had been on exhibition at the Century Association, New York City, and the remaining 63 portraits had been stored in the warehouse of the Lincoln Storage Warehouse Company, a corporation engaged in the business of storing goods for hire, in New York City. When the pictures were sent to the Pennsylvania Museum in Philadelphia, [fol. 38] Mr. Clarke surrendered his lease for storage space at the warehouse of the Lincoln Storage Warehouse Company, and from that time until the date of his death on January 18, 1931, did not pay any rentals for storage space in New York, or any other storage charges on account of these pictures. Although it would have been possible for Mr. Clarke at any time to re-engage storage space at the Lincoln Storage Warehouse Company, or at other warehouses in the City of New York, Mr. Clarke did not own, lease, or in any other way reserve or control, any storage space adequate for the storage of these pictures in New York City during the period from March, 1928, until his death on January 18, 1931.

On April 29, 1929, Mr. Clarke lent four of the portraits to the Virginia Historical Society for an exhibition at Richmond, Virginia, but these four portraits were returned to the Pennsylvania Museum in Philadelphia on May 25, 1929. With this exception, Thomas B. Clarke permitted all of the 79 portraits to remain at the Pennsylvania Museum in Philadelphia continuously from March, 1928, until the date of his death on January 18, 1931.

7. In answer to the averments of paragraph 7 of the Bill of Complaint, defendants aver that the collection of 79 portraits owned by Thomas B. Clarke had an estimated value on the date of his death of at least $714,750.

8. Defendants are advised and believe that the facts averred in paragraph 8 of the Bill of Complaint are true. In further answer defendants aver that Thomas B. Clarke permitted the 79 portraits to remain at the Pennsylvania Museum in Philadelphia from March, 1928, until his death on January 18, 1931. Defendants further aver that about a year after the pictures had been placed on exhibition at the Pennsylvania Museum in Philadelphia, Thomas B. Clarke, at the solicitation of Dr. Fiske Kimball, Director of the Museum, wrote to Dr. Kimball stating that if the latter could secure a donor who would present Mr. Clark's entire collection of early American portraits (consisting of these 79 portraits, and 85 other portraits owned by the Art House, a New York corporation whose entire capital stock was owned or controlled by Mr. Clarke, and which were also on exhibition at the Pennsylvania Museum) to the Museum, he would sell the collection as a whole to such [fol. 39] donor at a stated price. It was understood between Mr. Clarke and Dr. Kimball that Mr. Clarke would allow the portraits to remain at the Museum in Philadelphia during such reasonable time as Dr. Kimball might require to find such proposed donor. Subsequently, on May 21, 1930, Mr. Clarke again wrote to Dr. Kimball stating that the above arrangement would terminate on June 17, 1930. Defendants further aver, however, that even after the expiration of the arrangement permitting Dr. Kimball to find a donor to present the pictures to the Pennsylvania Museum in Philadelphia, and until the time of Mr. Clarke's death on January 18, 1931, Thomas B. Clarke was willing to dispose of his pictures to any purchaser who would buy

the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution, and who would pay the price set upon it by Mr. Clarke.

In further answer defendants aver that at no time prior to his death on January 18, 1931, did Mr. Clarke make any definite plans for the return of these pictures to New York, or (except as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum of Art to any other place.

9. Defendants are advised and believe that the facts averred in paragraph 9 of the Bill of Complaint are true. In further answer defendants aver that during the period from March, 1928, until the date of his death on January 18, 1931, Thomas B. Clarke never made any definite plans for the return of his paintings to New York, or (except as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum of Art in Philadelphia to any other place. At the time of the death of Thomas B. Clarke on January 18, 1931, the pictures owned by him (excepting the four portraits which had been sent to Richmond, Virginia, for about a month in 1929, as set forth in paragraph 6 of this Answer) had been physically located within the Commonwealth of Pennsylvania for a period of two years and ten months.

10. Defendants are advised and believe that the facts averred in paragraph 10 of the Bill of Complaint are true. Defendants deny, however, that any of these averments are in any way material to the issues presented by the plaintiff's Bill of Complaint.

[fol. 40] 11. The averments of paragraph 11 of the Bill of Complaint are admitted.

12. The averments of paragraph 12 of the Bill of Complaint consist of quotations from statutes of the Commonwealth of Pennsylvania and certain conclusions of law derived therefrom by plaintiff. Therefore, defendants are advised by counsel, believe and aver that they are not required to answer the averments of paragraph 12 of the Bill of Complaint.

13. Defendants are advised by counsel, believe and, therefore, aver that the averments of paragraph 13 of the

Bill of Complaint are conclusions of law which do not require any answer.

14. Defendants are advised by counsel, believe and, therefore, aver that the averments of paragraph 14 of the Bill of Complaint are conclusions of law which do not require any answer by the defendants.

15. Defendants admit that the plaintiff, through its attorneys, conferred with a representative of the Department of Revenue on or about March 25, 1931, and at that time made certain statements to the Department of Revenue upon which plaintiff based a claim for exemption from tax. Defendants also admit that notice of plaintiff's claim was given to the defendant, William A. Schnader, by letters dated March 26 and April 27, 1931.

16. The averments of paragraph 16 of the Bill of Complaint are admitted.

17. The averments of paragraph 17 of the Bill of Complaint are admitted.

18. Defendants admit that plaintiff filed under protest with the Department of Revenue at Harrisburg, on or about April 20, 1931, a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions", and that the said application contained the statements quoted in paragraph 18 of the Bill of Complaint.

19. The averments of paragraph 19 of the Bill of Complaint are admitted.

[fol. 41] 20. The averments of paragraph 20 of the Bill of Complaint are admitted. Defendants deny, however, that the facts averred therein are material to the issues presented by plaintiff's Bill of Complaint.

21. Defendants are advised and believe that the facts averred in paragraph 21 of the Bill of Complaint are true. Defendants deny, however, that any of the facts so averred are in any way material to the issues presented by the plaintiff's Bill of Complaint. In further answer defendants aver that at the time of the death of Thomas B. Clarke on January 18, 1931, the 79 paintings were physically located in Pennsylvania, and had been on exhibition within the Commonwealth of Pennsylvania for a period of nearly

three years. Defendants aver that, under the facts set forth in the Bill of Complaint and in this Answer, these 79 portraits had an actual situs in Pennsylvania, and that they were subject to the transfer inheritance tax imposed by the Commonwealth of Pennsylvania, and were not subject to any such transfer inheritance tax in the State of New York. Defendants further aver that the plaintiff paid such transfer inheritance tax to the State of New York with full knowledge of the possibility that a transfer inheritance tax upon these paintings might be demanded by the Commonwealth of Pennsylvania.

22. The averments of paragraph 22 of the Bill of Complaint are admitted.

23. Defendants are advised, believe and, therefore, aver that the allegations contained in paragraph 23 of the Bill of Complaint are argumentative, and contain only conclusions of law, which do not require any answer by defendants. Defendants aver, however, that no attempt has been made by them or by any other representatives of the Commonwealth of Pennsylvania in this case to interpret Section 1 of the Act of June 20, 1919, P. L. 521, as amended, as imposing an inheritance tax upon the transfer by death of the nonresident owner thereof of any property which was only temporarily within the Commonwealth of Pennsylvania at the time of the death of the owner thereof. Defendants aver that the 79 paintings owned by Thomas B. Clarke at the time of his death had been physically located within the Commonwealth of Pennsylvania for a period of nearly three years prior to Mr. Clarke's death. Defend- [fol. 42] ants further aver that, under the facts set forth in the Bill of Complaint and in this Answer, these 79 paintings were not temporarily within the Commonwealth of Pennsylvania, but had acquired an actual situs in Pennsylvania. Defendants deny that Section 1 of the Act of June 20, 1919, P. L. 521, as amended, in any way deprives the plaintiff of its property without due process of law, or in any way denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

24. Defendants are advised, believe, and therefore aver that the averments contained in paragraph 24 of the Bill of Complaint are argumentative, and contain only conclu-

sions of law, which do not require any answer by the defendants. Defendants deny, however, that the appraisal, assessment and collection by the Commonwealth of Pennsylvania of an inheritance tax upon the transfer of the 79 paintings owned by Thomas B. Clarke, and located within the Commonwealth of Pennsylvania at the time of his death, unconstitutionally deprives the plaintiff of its property without due process of law, or denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. In further answer defendants aver that under the facts set forth in the Bill of Complaint and in this Answer the 79 paintings owned by Mr. Clarke were not temporarily within the Commonwealth of Pennsylvania at the time of his death, but had acquired an actual situs in Pennsylvania. The pictures had been physically located within the Commonwealth of Pennsylvania for nearly three years prior to Mr. Clarke's death. At no time prior to his death on January 18, 1931, did Thomas B. Clarke make any definite plans for the return of the pictures to New York, or (except in the case of the 4 portraits sent to Richmond, Virginia, for one month in 1929, and subsequently returned to Philadelphia, as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum in Philadelphia to any other place.

25. Defendants are advised and believe that the averments of paragraph 25 of the Bill of Complaint consist of inferences of fact and conclusions of law which do not require any answer by defendants.

[fol. 43] 26. Defendants deny that the plaintiff has no adequate remedy at law. On the contrary, defendants aver that the plaintiff has a full, adequate and complete remedy at law duly provided by the statutes of the Commonwealth of Pennsylvania permitting the plaintiff to appeal to the Court of Common Pleas of Dauphin County from any assessment made against it by the defendants.

27. In further answer to plaintiff's Bill of Complaint, defendants aver that this suit is brought against defendants in their official capacities as Attorney General and Secretary of Revenue, respectively, of the Commonwealth of Pennsylvania, and that, therefore, the suit is brought against the Commonwealth of Pennsylvania, contrary to

the provisions of the Eleventh Amendment to the Constitution of the United States of America. Therefore, defendants aver that this Honorable Court is without jurisdiction to entertain the plaintiff's suit.

Wherefore defendants pray that they may be hence dismissed with their reasonable costs and expenses in this behalf incurred.

Wm. A. Schnader, Leon D. Metzger.

Duly sworn to by Leon D. Metzger. Jurat omitted in printing.

In United States District Court

[Title omitted]

Stipulation as to Certain Facts—Filed Jan. 5, 1933

It is stipulated and agreed between counsel for plaintiff and defendants in the above case that the case may be disposed of by the Court as of final hearing on the facts alleged in the Bill and Answer with the following additional facts, which are, for the purposes of this case, admitted by both parties to be correct:

Thomas B. Clarke, the testator, was 82 years of age at the time of his death; it was understood between Mr. Clarke and Dr. Kimball that the Philadelphia Museum of Art should pay all expenses directly incident to Mr. Clarke's loaning the pictures to the Museum, as averred in the Bill, and the Museum actually did pay the expenses of transportation from New York, including insurance in transit; [fol. 44] the New York law provides a procedure for refund of inheritance taxes improperly paid, but this procedure does not provide for a refund of interest on the tax; at the time of Mr. Clarke's death all the beneficiaries of his Estate were non-residents of Pennsylvania. Prior to the loan to the Philadelphia Museum of Art here involved, Mr. Clarke had permitted practically all of these portraits to be exhibited in selected groups from time to time in New York at the Century Club and at the Union League Club, of each of which clubs Mr. Clarke was a member. In this way all the 79 pictures had been exhibited

in New York, in each case with selected groups of the 85 portraits belonging to Art House, Inc., but not as a unit nor in connection with the entire other 85 pictures belonging to Art House, Inc. The number of portraits so exhibited from the personally owned collection of 79 never exceeded fifteen at any one time, although, by reason of additions from Art House, Inc., the entire group so exhibited was usually larger. For several years before 1928, the greater part of the pictures had been in storage, selected groups going out and in for exhibition purposes.

H. S. Drinker, Jr., Attorney for Plaintiff. Wm. A. Schnader, Lucien B. Carpenter, Attorneys for Defendants.

December 20, 1932.

In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and The Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of-Pennsylvania

Before Thompson, C. J.; Dickinson, and Kirkpatrick, D. JJ.

Opinion sur Pleadings and Proofs—Filed March 24, 1933

The plaintiff, the executor of a non-resident decedent, has brought this suit in equity to restrain the Pennsyl- [fol. 45] vania taxing authorities from appraising for inheritance tax a collection of paintings, the property of the decedent, physically located within the state of Pennsylvania, and from taking steps to collect the tax. The plaintiff alleges that the pictures were in Pennsylvania for a temporary and transient purpose only and are not taxable there.

The basis for equity jurisdiction is asserted in paragraph 25 of the bill. It is there set forth that the threatened collection of the tax is causing immediate and irreparable injury in that it is (1) seriously interfering with the administration of the estate and delaying distribution, (2) compelling the plaintiff to maintain large cash reserves at low interest rates against the possibility of having to pay the tax, and, (3) creating a "possible lien" and therefore clouding the title of the plaintiff to the paintings.

The answer does not challenge these statements but merely states that they are inferences of fact and conclusions of law which do not require answer. The answer does however aver that the plaintiff has an adequate remedy at law and specifies the right of appeal to the state courts from the assessment, granted by the Pennsylvania statute.

The law is settled beyond all question that there must be some ground for invoking the equity powers of the court, other than the illegality or unconstitutionality of the tax. Boise Artesian etc. Water Co. vs. Boise City, 213 U. S. 276. Such ground among others has been found in former decisions in the creation of a cloud upon title (Shaffer vs. Carter, 252 U. S. 37; Union Pacific Railway Company vs. Cheyenne, 113 U. S. 516; Pacific Express Co. vs. Seibert, 142 U. S. 339; Ogden City vs. Armstrong, 168 U. S. 224; Ohio Tax Cases, 232 U. S. 576; Green vs. Louisville & Interurban R. R. Company, 244 U. S. 499).

No decision has been called to our attention in which a possible lien upon a specific article or articles of personal property has been held to constitute a cloud upon title which will warrant injunctive relief. In all the cases cited real estate was involved and the clearing of real estate titles was the historical basis of this branch of the jurisdiction. In many of the cases the unpaid tax became, by the law of the state, a lien upon all of the taxpayer's property within the state, whether subject to the tax or not. That [fol. 46] this would cause irreparable injury, particularly where the plaintiff is a railroad company or, as in Shaffer vs. Carter, supra, the owner of numerous gas and oil mining leases, is plain. That situation does not exist here however. The Pennsylvania Act of April 9, 1929, Purdon, Title 72, Sec. 1401, imposing a lien for unpaid taxes expressly provides, "but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith."

Whether the want of an adequate remedy at law be viewed as constituting in itself a ground of equitable jurisdiction or whether the existence of such remedy be taken as limiting a jurisdiction which might otherwise attach, this court cannot proceed if there is such a remedy. The provision of R. S. 70, "Suits in equity shall not be sustained in any court of the United States where a plain, adequate and complete remedy may be had at law" must be observed.

"The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." Matthews vs. Rodgers, 284 U. S. 521, 525.

"If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection sua sponte". Singer Sewing Machine Company vs. Benedict, 229 U. S. 481, 484. See also Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 690; Matthews vs. Rodgers, supra. Where the objection is not presented by the defendant in limine it may be treated as waived, provided the existence of a legal remedy is not obvious. In view of the fact that the answer in this case explicitly raises the objection, we do not think that the hope expressed by the defendant's counsel at the oral argument that this Court would find it possible to take jurisdiction was intended as a waiver or, even if so intended can be treated as such.

The laws of Pennsylvania do not extend to the taxpayer the remedy of paying the tax under protest and bringing [fol. 47] suit in the courts for its recovery—a procedure which where *it* clearly available, has always been treated as affording a complete and adequate remedy at law. (Shelton vs. Platt, 139 U. S. 591; Singer Sewing Machine Company vs. Benedict, supra; The Henrietta Mills vs. Rutherford County, N. C. 281 U. S. 121; Matthews vs. Rodgers, supra; Stratton vs. St. Louis, etc., Ry. Company, 284 U. S. 530). But neither do they give to the State authorities the coercive measures of distraint and levy without a

prior judicial determination of the legality and amount of the tax, if the taxpayer desires it and, therefore, he has a completer remedy than by suit to recover a tax paid.

Under the law of Pennsylvania, the first step for the assessment of a transfer inheritance tax upon the estate of a non-resident decedent is an appraisement of the property which it is proposed to tax by an agent of the Department of Revenue, of which appraisement notice must be given to all interested parties. The act then provides that, "Any person not satisfied with the appraisement * * * may appeal * * * to the court of common pleas of Dauphin County, on paying or giving security to pay all costs together with whatever taxes shall be fixed by the court. Upon such appeal, the court may determine all questions of valuation, and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court". (Act of April 9, 1929, P. L. 343. Purd. Tit. 72. Sec. 1202.)

The procedure for the collection of the tax as finally determined, is also defined by the Act of April 9, 1929, above referred to. After the tax has remained due and unpaid for a year the Department of Justice acting on behalf of the Department of Revenue may apply to a court of Common Pleas "by bill or petition, to enforce payment of the same, whereupon the court, having caused notice to be given * * * shall proceed according to equity to make such decree or order for the payment of the tax out of such property, as shall be just and proper". Or, at its discretion, the Department of Justice may bring "in any court of the Commonwealth having jurisdiction, any appropriate suit at law or in equity, by action of assumpsit or otherwise, for any * * * taxes due the Commonwealth". Purdon, Tit. 72, Sec. 1406. In such suit or where the pro-[fol. 48] cedure is by petition, the taxpayer may make the defense that the taxing statute is unconstitutional or that the tax was illegally assessed by reason of the non-taxable situs of the property or any other defense which he may have.

In Keokuk & Hamilton Bridge Company vs. Salm, 258 U. S. 122, the Supreme Court considered procedure provided by the statutes of Illinois, essentially the same as the foregoing in all respects, and held that "The Law of Illinois affords ample opportunity to question the amount and

validity of an assessment both before administrative tribunals and in its courts", and upheld a decree of the District Court dismissing the bill because of an adequate remedy at law. True, that was a case in which it was admitted that some tax was due, the basis of the complaint being discriminatory over-valuation, and the Supreme Court held that another ground for dismissing the bill was the failure of the taxpayer to have paid or tendered the amount of the taxes confessedly due. Nevertheless the decision rested upon both grounds and appears to be dispositive of the question of an adequate remedy at law in this case.

In general, injunctive relief will be denied against threatened action at law where the matters relied upon would be a complete defense to the action and where the plaintiff's right will be fully protected by a successful defense. 21 C. J. 68. A judgment in such action would be as complete and adequate a remedy as an injunction. Grand Chete vs. Winegar, 15 Wall. 373.

We are not unmindful of the rule of Smyth vs. Ames, 169 U. S. 466; Chicago, etc., Ry. Company vs. Osborne, 265 U. S. 14, and many other cases to the effect that the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts (Risty vs. Chicago etc. Ry. Company, 270 U. S. 378) and, of course, a non-resident sued by the state of Pennsylvania for tax cannot remove the cause to the District Court upon the ground of diversity of citizenship. (Nevada-California Power Company vs. Hamilton, 235 Fed. 317.) But he may raise the constitutionality of the statute or the rights asserted under it by way of defense, and, as was pointed out in Matthews vs. Rodgers, supra, "If the remedy at law [fol. 49] (given by the state law) is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court (the Supreme Court of the United States) for review if any federal question be involved. * * *"

We do not think that the remaining allegations of the bill—as to possible delay in the administration of the estate and the inconvenience of being compelled to keep enough money on hand to meet the tax if it should be found to be valid—set forth any irreparable injury. These are ordi-

nary incidents in the administration of any estate in which disputed questions have to be litigated. There may conceivably be situations in which delay would cause irreparable injury to the estate, but no circumstances suggesting anything of the sort in this case are averred, and we must assume that the case is the ordinary one in which delay and the withholding of funds from distribution for a period of time is by no means unusual or particularly serious.

The conclusion is that the bill must be dismissed for want of equitable jurisdiction in this Court.

By the Court:

W. H. Kirkpatrick, J.

In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

Decree—Filed April 11, 1933

And now, to-wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

[fol. 50] I. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff.

By the Court:

J. W. Thompson, Circuit Judge.

[fol. 51] IN UNITED STATES DISTRICT COURT

MANDATE—Filed Jan. 15, 1934

UNITED STATES OF AMERICA, ss:

(Seal.)

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you, or some of you, in a cause between City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Plaintiff, and The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Defendant, In Equity, No. 7395, wherein the final decree of the said District Court, entered in said cause on the 11th day of April, A. D. 1933, is in the following words, viz:

"And now, to wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff.

By the Court:

J. W. Thompson, Circuit Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 52] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause be, and the same is hereby, reversed with costs; and that the said plaintiff, City Bank Farmers Trust Company, Executor, etc., recover against the said defendants One Hundred and Eighty-five Dollars and Thirty-five Cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said District Court with instructions to reinstate the bill and proceed to a hearing upon the merits.

January 8, 1934.

[fol. 53] You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal, notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the fifteenth day of January, in the year of our Lord one thousand nine hundred and thirty-four.

Costs of Plaintiff:

Clerk	$65.90
Printing Record	99.45
Attorney	20.00
	$185.35

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 54] In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

Opinion

Sur Pleadings and Proofs—Filed March 29, 1934

Thompson, C. J., and Dickinson and Kirkpatrick, D. JJ.

Opinion of the Court by Kirkpatrick, J.:

This case involves the taxable situs of tangible personal property. The occasion for imposing the tax is the transfer of the property by death of the owner.

In the case of intangibles the law is now well settled that the state in which the owner is domiciled and no other may impose an inheritance tax. Farmers Loan Company vs. Minnesota, 280 U. S. 204; First National Bank vs. Maine, 284 U. S. 312. The facts upon which these decisions were rendered did not involve the taxation of tangibles. In the opinion of the Minnesota case the Court made it perfectly clear that the taxable situs of such property depends upon entirely different considerations.

[fol. 55] The outstanding decisions governing the taxation of tangible personalty are Gromer vs. Standard Dredging Company, 224 U. S. 362; Frick vs. Pennsylvania, 268 U. S. 473; and Blodgett vs. Silberman, 277 U. S. 1. The first of these cases recognized and applied the general rule "than tangible personal property is subject to taxation by the State in which it is, no matter where the domicile of the owner may be". The Court pointed out that there was nothing in the case to show that the property (certain machinery and boats) was only temporarily within the territorial limits of the jurisdiction which proposed to tax it. The import of the decision is that where nothing appears

in the case beyond the facts that the property is in one jurisdiction and the domicile of the owner in the other the property is taxable where it is. It was really upon this point that the Court divided, the minority holding in substance that the presumption is the other way, that all personal property is ordinarily taxable at the owner's domicile and that if it is to be taxed somewhere else it must be shown that its location in the taxing state was not "of a temporary or fleeting character".

In the Frick case the expression "where it is" as defining the taxable situs of such property was exchanged for "actual situs". Actual situs means a little more than simply the place where property is. It excludes the idea of mobile personal property which happens to be in the course of transit in or through the taxing state at the moment when the occasion for taxation arises. It also excludes the [fol. 56] idea of property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief and limited time. In either of these cases its location there would be of a temporary or fleeting character.

It does not however demand or necessarily involve any idea of permanency or a permanent location in the taxing state. In the Minnesota Case the Court, in discussing the Frick Case, said that it had been there held that no state could "impose death duties reckoned upon the value of tangibles located permanently outside her limits". But as a matter of fact the decision in the Frick Case had gone much further than that, and in its later opinion in First National Bank vs. Maine the Court again reviewed the Frick Case and stated its doctrine as being "the power to tax is exclusively in the state where the property has an *actual situs*".

In the true sense, permanency of location can never be predicated of personal property. The pictures which Mr. Frick housed in the specially built gallery or museum in New York were probably as permanently located where they were as any personal property could ordinarily be, but they might have been removed at any time without difficulty, and there was certainly nothing permanent about the location of the automobiles in his New York garage or the farming implements on his Massachusetts estate. Even less permanent was the location of the money in the safe

deposit box in the Blodgett Case. To attempt to identify [fol. 57] actual situs with permanent location as applied to personal property is only productive of confusion of thought.

If, then, actual situs is not permanent situs, we must turn to the facts of the Frick and Blodgett Cases to ascertain what it is. From the Frick Case we learn (among other things) that, where the owner has residences in two or more states, furniture, automobiles, farming implements etc. located at such residences (though not the domiciliary one) have an actual situs at the place where they are. From the Blodgett Case it appears that bank notes and coin in a safe deposit box (there being nothing to show us for what purpose they were there or how long they had remained) also have an actual situs in the state in which they are, though the owner is domiciled elsewhere.

In the case at hand the following facts appear with regard to the portraits which are the subject of the tax: (1) They had been physically located in Pennsylvania two years and ten months. (2) At the time of the owner's death no definite plans had been made for their removal and no definite limit had been placed by the owner upon the duration of their stay in Pennsylvania.

If there were no other facts in the case it would be beyond dispute that the portraits had an actual situs in Philadelphia. To show that they had something less than that, the complainant points out (1) that the pictures were loaned, without consideration, to the Pennsylvania Museum for the purpose of exhibition, for the pleasure and education of the public; (2) that the loan was not a "permanent loan" after the manner of many loan exhibitions, but that [fol. 58] it was understood that the pictures would be returned to the owner on his request, which might be made at any time; and (3) that the owner, after two years and two months, had stated that the arrangement would terminate on a fixed day about a month later, but that the pictures were allowed to remain thereafter until his death in the hope (apparently entertained by both the owner and the museum authorities) that a donor could be found who would buy the paintings and present them to the Museum.

As we interpret the meaning of actual situs, it is not destroyed or impaired by these facts. Certainly it must be conceded that the location in Pennsylvania was not perma-

nent, but as has been stated it need not be. Perhaps it might be said that it was temporary, although it was only such in the sense that the owner reserved the title and the right to remove the property when he saw fit—a right which he did not exercise for nearly three years and which, so far as the record shows, he had no definitely formed intention of exercising at any predictable time. The portraits were safely housed in Pennsylvania and were under the protection of the laws of that state. They had been taken out of storage to be placed where they were. They were there for an indefinitely prolonged stay and that, we think, gives them an actual situs.

It may be conceded that the idea of a sale, though by no means to be disregarded, was secondary and remote and [fol. 59] that the portraits were in Pennsylvania primarily for the purpose of being exhibited to the public. If it had appeared that the exhibition was for a specific occasion or for a brief and limited time I do not say that this fact would not have been of importance as giving a transitory character to their location here. But when the stay is of unlimited duration or, as suggested, indefinitely prolonged, the mere fact that its main purpose is public exhibition is not enough to destroy the actual situs of the property.

We would readily agree that if these portraits could be endowed with personality the facts appearing in the record would not be sufficient to show an intention upon their part to change their domicile from New York to Pennsylvania. This is practically the test which the complainant urges upon us. But it is also in substance the view that was urged by the minority and rejected in Gromer vs. Standard Dredging Company, supra. The law as set forth in that case and uniformly followed with regard to tangibles is that the inquiry is not whether the property has departed from its, or its owner's domicile but whether the place where it is, regardless of the owner's domicile, is its actual situs.

The bill may be dismissed.

[fol. 60] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT

(1) In March, 1928, Thomas B. Clarke, a citizen and resident of New York City, then in his 80th year, at the

request of his intimate friend Dr. Fiske Kimball, Director of the Pennsylvania Museum, loaned to the Museum his unique collection of early American portraits.

(2) The arrangement between Clarke and Kimball was wholly oral. No consideration was paid or intended to be paid to Clarke for the loan. It was understood that the pictures would be returned to Clarke at any time on his request.

(3) On several occasions subsequent to the date of the original loan in March, 1928, Clarke suggested the return of the paintings, but under pressure from Kimball to extend his loan because of the great appreciation shown by the public, Clarke orally consented from time to time to leave the paintings temporarily at the Museum and thus when Clarke died on January 18, 1931, they were there on display, returnable on demand.

(4) The 164 paintings comprising the loan had been collected by Clarke over a period of twenty or thirty years. 85 of them were owned by a New York corporation, The Art House, Inc., of which Clarke was the sole stockholder. Of the remaining 79 owned by Clarke personally, 5 were at the time of the loan in his New York residence, 10 were on exhibition at the Century Club in New York, and the balance, 64, were in storage in New York City. All of the 79 owned by Clarke personally, which at the time of the loan had an unquestioned situs in New York City, had from time to time been exhibited there, in each case with selected groups of the 85 belonging to The Art House, Inc., but not [fol. 61] as a unit or in connection with the entire 85

(5) In the spring of 1929, after the pictures had been at the Museum for about a year, Clarke, at Kimball's solicitation, wrote Kimball that if Kimball could secure a donor who would present the entire collection of 164 paintings to the Museum, Clarke would sell them as a whole to such donor at a stated price, it being then understood that Clark would allow them to remain at the Museum for such reasonable time as Kimball might require to secure such donor. Subsequently, on May 21, 1930, Clarks again wrote Kimball stating that the above arrangement would terminate on June 17, 1930. From the latter date, at Kimball's solicitation, the pictures were permitted by Clarke to remain at

the Museum until his death on January 18, 1931, but with the understanding that they would be returned to Clarke in New York at any time on his request. During this time, Mr. Clarke, although not obligated to sell or otherwise to dispose of them, was willing to sell to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution.

(6) When the pictures were sent to Pennsylvania, Clarke surrendered his lease for the storage space in a New York warehouse where 64 of the pictures were at that time. Thereafter, Clarke paid no rentals for storage space or any other storage charges on account of these pictures, nor did he reserve or control any storage space adequate for the storage of the pictures in New York from March, 1928, [fol. 62] until the time of his death on January 18, 1931. Such storage space was, however, always readily obtainable during the entire period of the loan.

(7) While the paintings thus remained at the Museum, Clarke made no definite plans or request for their return to New York or their removal to any other place, except that on April 29, 1929, four of them were sent at his request to the Virginia Historical Society, for an exhibition at Richmond, which four were returned to the Philadelphia Museum on May 25, 1929.

(8) The Museum is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania and has secured a substantial portion of the works of art therein displayed to the public by voluntary loans from non-resident philanthropists, none of which were intended or regarded as permanent loans to the Museum. It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans.

(9) Following Clarke's death the controversy arose as to the power of the State of Pennsylvania to impose an inheritance tax on the 79 paintings belonging to the Estate of Mr. Clarke, the question being as to which of the two states, Pennsylvania or New York, was entitled to the tax. After some attempt by the Pennsylvania authorities to work out

a reciprocity agreement with New York, complainant paid (under protest) the New York Estate Tax amounting to [fol. 63] $69,500, and Mr. Schnader having advised that complainant's claim of non-taxability in Pennsylvania would be denied, complainant brought the present bill.

At the prior hearing, this Court dismissed the bill on the ground that complainant had an adequate remedy at law. On appeal the Supreme Court reversed the judgment and remanded the case with instructions to reinstate the bill and proceed to a hearing upon the merits.

(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that State at that time.

CONCLUSION OF LAW

The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed.

By the Court:

——— ———.

———

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

DISSENTING OPINION

DICKINSON, J., dissenting:

The events attending the trial and ruling in this cause evidence that it is what is called a "close case". The turning point in it is really a fact finding. There is nothing in this which of itself would justify a dissent. The majority opinion gives the view which the Court has taken. It has been thought that the opposing view should be presented.

The majority opinion starts with the proposition that [fol. 65] tangible property is taxable where it is unless there is in the fact situation something which takes it out of this rule. Then follows the fact finding that the case before us presents no such exempting feature. Confronting this is the other view of the fiction of the law that personal property is wherever its owner is and is in the place of his domicile. It is in consequence only there taxable

unless there is that in the fact situation which gives it a situs of its own independent of the domicile of its owner. This fiction is followed in the case of intangibles, but in the case of tangibles may be overthrown by conflicting facts. The question is one of cold blooded law. Whatever element of sentiment there might be in the case is submerged in the fact that the question is really between two States, and whether the tax is payable to Pennsylvania or New York, with the circumstance present that the Pennsylvania tax exaction is the greater. If the situation were reversed and this property was in New York but belonging to the estate of a decedent whose estate was being administered in Pennsylvania, we may assume the taxpayer would not be objecting to a taxation in New York.

The evidentiary facts are not in controversy. They are found in the Answer, supplemented by the undenied averments of the Bill, and have been so stipulated. The pertinent facts are few.

A collection of portraits belonged to a citizen of New York and were physically there. They had great historical, and we have no doubt, artistic value. The owner had at the time no use for them for display purposes or other- [fol. 66] wise, and would have put them in storage. The Art Museum of Philadelphia, learning of this, requested a loan of the collection in order that they might be hung in their galleries for public exhibition. The owner had gathered the collection for his own gratification as an art lover or as a collector. The portraits were not held for sale. He acceded to the request made of him. In this he had no selfish motive, but incidentally he did profit by saving storage, insurance and other charges, and by whatever element of value there was in the publicity given to his collection in case he should ever wish to sell it. The collection thus went to Philadelphia. After being on exhibition at the Art Museum for some time, the owner asked for its return. The Managers of the Art Museum thought highly of the collection and indulged the hope that they might find a friend and patron who would buy it to present to the Museum. They in consequence appealed to the owner, with the request that he permit the portraits to remain with the Museum and put a price upon them for sale to any one who would present them to the Museum. In so doing the owner was not actuated wholly by a commercial motive,

but he took a pride in his collection, which was gratified by the thought of its being kept intact and put on public exhibition. No time limit was mentioned but the owner was at liberty to have the portraits returned to him whenever he chose. The hopes of the Museum Managers were not realized, and the owner died with the portraits still on exhibition.

Out of this has arisen the conflicting claims of Pennsylvania and New York to the right to impose an inheritance [fol. 67] tax. The distinction of when tangible property is taxable in the jurisdiction in which it is, and when it is assumed to be in the domicile of its owner, is illustrated by the not uncommon practice of an owner of such property having residences in different places. A man may have a town and country residence and summer and winter ones, with tangible personal property in each. If they are in different States, the question, in case of his death, arises of what property is taxable in each. Along with this there may be a question of the domicile of the owner. The latter question may throw some light on the former but the two are distinct and different.

The case of Frick vs. Pa., 268 U. S., 473, and others give us the rule for our guidance, but it is not always easy to apply it. It is especially difficult to find a phrase by which the rule may be expressed. The majority opinion employs a happy phrase which comes as near to its expression as any which has been coined, but which yet does not fully express it. The phrase applied to the duration of time the property has been where it is and the expectation of its continuance is "indefinitely prolonged". The fact situation must have this element but yet this is not wholly controlling. There are two expressions in the vernacular which convey the idea. We speak of a place in which a person or thing "belongs" or that a person or things has its "proper place". Wherever a tangible thing "belongs" or has its "proper place", there it is taxable. The truth seems to be that that rule is based upon an idea which is not difficult to grasp but which cannot be verbally defined. [fol. 68] There are many such ideas. The practical consequence is that the question of where property is taxable turns upon an ultimate fact finding to be made in each case presented. In this case the fact finding made is that these portraits at the time of the owner's death, were in Penn-

sylvania and here under circumstances which would not justify the finding that they were not to stay here because they were here with no end of their stay in sight. In other words, their stay was to be "indefinitely prolonged".

We could join in this finding except for one circumstance. The portraits were sent here only for exhibition purposes. Such a stay is transient. We do not see that the character thus given to their stay here was changed by the hope that some one might buy them for presentation to the Museum. The hope remained a hope and was never realized. More than this the law has its policies as well as its principles. There are works of art which it is a liberal education to view. Pilgrimages are made as to a shrine by unnumbered thousands to where they are. Many more thousands are unable to do this. Works of art are, because of this, taken to where the viewers are, that they may see them. This may be to Expositions, such as the Centennial or the Century of Progress. They likewise are put on view in permanent art exhibitions, such as the Academy of Fine Arts or the Art Museum in Philadelphia, the Metropolitan in New York, the Corcoran Art Gallery in Washington and countless other art displays. If the loan of them for such display is meant to be for a limited time, no one would say that they were thus subjected to taxation at the place where on [fol. 69] display, merely because of the accidental circumstance that the owner had died while they were still there. The question of liability to tax arises when the display is "indefinitely prolonged". This exhibition of famous works of art serves a useful public purpose so that the law should not discourage the practice of making such loans. We may be sure that the policy of the law is not to discourage the practice. This means that in making the fact finding of whether works of art thus on exhibition had so far a permanent habitat as to be taxable, the Courts should not be over eager to make that finding. We cannot escape the feeling that it is an ungracious act on the part of any State to tax the owner of art treasures who has sent them into the State to be exhibited for the gratification and education of the people of the State. Merely because their stay there has been prolonged is no justification for taxing them, especially when, as here, the stay has been prolonged because the owner was urged to permit them to remain on exhibition.

As it has been determined that this Bill may be maintained, we think that on its merits its prayers should be granted and the injunction prayed for issue.

[fol. 70] In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor Under the Will of Thomas B. Clarke, Deceased, Complainant,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Respondents

Final Decree—Filed April 5, 1934

And now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

I. That the Bill of Complaint be, and is hereby dismissed.

By the Court.

(S.) O. B. Dickinson, Judge.

[fol. 71] In United States District Court

[Title omitted]

Petition for Appeal—Filed April 5, 1934

The above-named complainant, feeling aggrieved by the decree made and entered in the above entitled proceeding in equity on the 5th day of April, A. D. 1934, does hereby appeal from the said decree to the Supreme Court of the

United States, for the reasons specified in the Assignments of Error filed herewith; and prays that this appeal may be allowed, and that a transcript of the record proceedings and papers, upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States under the rules of the said Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

Dated April 5, 1934.

Leslie M. Swope, Henry S. Drinker, Jr., Attorneys for Appellant.

[fol. 72] In United States District Court, Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Complainant,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Respondents

Order Allowing Appeal—Filed April 5, 1934

And now, to-wit, April 5th, 1934, the foregoing appeal to the Supreme Court of the United States is allowed upon the giving by the above-mentioned complainant of a bond, as required by the law, in the sum of two hundred fifty dollars.

(S.) O. B. Dickinson, Judge.

[fol. 73] In United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed April 5, 1934

And now, to-wit, April 5, 1934, comes the complainant in the above-entitled proceeding in equity, appellant herein,

and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the decree made by this Honorable Court on the 5th day of April, 1934, in the above-entitled case.

I

That the United States District Court for the Eastern District of Pennsylvania erred in denying the injunction prayed for by the complainant.

II

That the United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint on the merits.

[fol. 74]

III

That the United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceedings in equity upon the complainant.

IV

That the United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

"And now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

"I. That the Bill of Complaint be, and is hereby dismissed."

V

That the United States District Court for the Eastern District of Pennsylvania erred in making the following finding:

"(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that state at that time."

VI

That the United States District Court for the Eastern District of Pennsylvania erred in making the following [fols. 75–77] conclusion of law:

"The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed."

Wherefore, the appellant prays that the aforesaid decree be reversed and that a decree be entered in accordance with the prayer of the complainant set forth in its Bill of Complaint and for such further relief and in such form as the Supreme Court of the United States shall deem just.

Leslie M. Swope, Henry S. Drinker, Jr., Attorneys for Appellant, 1429 Walnut Street, Philadelphia, Pa.

[fol. 78] In United States District Court

[Title omitted]

Stipulation re Transcript of Record—Filed April 18, 1934

It is hereby agreed and stipulated, in lieu of præcipes, that the following portions of the record of said District Court in the above matter are to be included in the transcript:

Docket entries.
Bill of Complaint.
"Exhibit A" (Will of Thomas B. Clarke and codicils).
Injunction Affidavit of Charles C. Jordan.
Injunction Affidavit of Fiske Kimball.
Motion for Interlocutory Injunction.
Restraining Order.
Bond sur restraining order.
Answer.
Stipulation as to certain facts.
Opinion of the Court, Kirkpatrick, J., sur pleading and proofs filed March 24, 1933.
Decree—filed April 11, 1933.
Opinion Supreme Court reversing and remanding.

Opinion District Court on rehearing.
Final Decree.
[fol. 79] Petition for appeal.
Order allowing appeal.
Assignment of Errors and Prayer for Reversal.
Statement as to Jurisdiction of Appeal.
Notice as to opposing Statement of Jurisdiction.
Waiver of Jurisdiction by appellees.
Citation and Acceptance of Service thereof.
Bond sur appeal.
Proof of service of papers pursuant to Rule 12.
Stipulation re transcript of record.
Clerk's certificate.

Leslie M. Swope, Attorney for Appellant, of Counsel.
Harris C. Arnold, Deputy Attorney General, Attorney for Appellees, of Counsel.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] In Supreme Court of the United States

Statement of Points to be Relied Upon and Stipulation as to Printing Record—Filed May 4, 1934

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

I. That the United States District Court for the Eastern District of Pennsylvania erred in denying the injunction prayed for by the complainant.

II. That the United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint on the merits.

III. That the United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceedings in equity upon the plaintiff.

[fols. 82 & 83] IV. That the United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

"And now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

"I. That the Bill of Complaint be, and is hereby dismissed."

V. That the United States District Court for the Eastern District of Pennsylvania erred in making the following finding of fact:

"(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that state at that time."

VI. That the United States District Court for the Eastern District of Pennsylvania erred in making the following conclusion of law:

"The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed."

Henry S. Drinker, Leslie M. Swope, Attorneys for Appellant, 1429 Walnut Street, Philadelphia, Penna.

Service accepted April 10, 1934. Harris C. Arnold, Deputy Attorney General, of Counsel for Appellees.

[fol. 84] STIPULATION RE DESIGNATION OF THE PARTS OF RECORD TO BE PRINTED

Comes now the appellant and the appellees by their undersigned counsel and stipulate that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of paper	Record page
Docket Entries	1
Bill of Complaint	3
"Exhibit A" (Will of Thomas B. Clarke and codicils)	13
Injunction Affidavit of Charles C. Jordan	21
Injunction Affidavit of Fiske Kimball	28

Motion for Interlocutory Injunction 31
Restraining Order 32
Answer 37
[fols. 85 & 86] Stipulation as to certain facts 43
Opinion of the Court, Kirkpatrick, J., sur pleading and proofs filed March 24, 1933 44
Decree—filed April 11, 1933 49
Mandate from Supreme Court of the United States 51
Opinion, Kirkpatrick, J., sur pleadings and proofs (Filed Mar. 29, 1934) 54
Findings of Facts 60
Conclusion of Law 63
Dissenting opinion, Dickinson, J 64
Final Decree 70
Petition for appeal 71
Order allowing appeal 72
Assignment of Errors and Prayer for Reversal ... 73
Statement as to Jurisdiction of Appeal ..... Separate Transcript
Notice as to opposing Statement of Jurisdiction ..... " "
Waiver of Jurisdiction by appellees " "
Proof of service of papers pursuant to Rule 12 ..... " "
Stipulation re transcript of record 78
This Stipulation designating parts of record to be printed.
Statement of points to be relied upon, filed herewith.

Leslie M. Swope, Attorney for Appellant, of Counsel. Harris C. Arnold, Deputy Attorney General, Attorney for Appellees, of Counsel.

May 3, 1934.

[fol. 87] [File endorsement omitted.]

Endorsed on cover: File No. 38,623. E. Pennsylvania, D. C. U. S. Term No. 30. City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Appellant, vs. William A. Schnader, Attorney General of the Commonwealth of Pennsylvania and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania. Filed May 4, 1934. File No. 30, O. T., 1933.